REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CIVIL APPEAL NO. 300 OF 2006

TOMBE TEA FACTORY …….…. APPELLANT
-VERSUS-

SAMUEL MOMANYI …….…. RESPONDENT

JUDGMENT

(Being an appeal from the judgment and decree of Hon. Wahome SRM, dated and delivered on 25th October 2006 in Keroka Senior Resident's Magistrate Court.)

The respondent herein moved the Senior Resident Magistrates court at Keroka by plaint dated 17th March 2006 and filed in court on 20th March, 2006 seeking judgment against the appellant for:

a) Special damages

b) General damages

c) Cost of the suit

d) Interest

The basis of the respondent's claim was that at all material times he was an employee of the appellant as a general worker and that he was injured on the 16th day of September 2004 while in the course of his employment with the said appellant. He averred that the accident was occasioned by the appellant's alleged breach of statutory duty and/or common law duty towards him. Further and in the alternative he claimed that the said accident was caused by the appellant's common law negligence particulars he were stated. The respondent averred that as a result of the accident he sustained a deep cut wound on the right leg and thereby suffered loss and damage.

The appellant filed its defence to the respondent's claim dated 29th March 2006. It denied the respondent's allegations and put him to strict proof. In particular it denied that the respondent was its employee at all material times relevant to this suit and the particulars of breach of statutory duty, or common law negligence on the part of the appellant. In the alternative the appellant averred that the accident, if it all, was solely caused and or substantially contributed to by the negligence of the respondent. It proceeded to give the particulars of respondent's negligence.

The suit thereafter proceeded to hearing before **Wahome,** Senior Resident Magistrate. The respondent in his testimony stated that he was on duty at the appellant's factory on 16th September 2004 and while removing tea from the conveyor belt he fell and was injured on the right leg and left hand. He blamed the appellant for the accident as it did not provide him with protective gear like gloves and boots and for failing to train him on how to carry out his duties. On cross-examination he stated that the appellant employed him in 1999 and his check roll number was C115. The respondent confirmed that his name was neither in the muster roll nor the accident register for the month of September 2004 and had no explanation. He conceded that even if gloves had been provided, would not have assisted him. He stated that even though boots were not provided the place of work was safe. He conceded further that he was not sure if the machine was defective. In re-exam he confirmed that there was no record of anyone who was injured on 19th September 2004 in the appellant's records for that day. The next witness called by the respondent was PW2 who stated that he examined the respondent and confirmed that he had a scar on the right leg which was not tender. His conclusion was that the respondent had sustained soft tissue injuries, which had healed well with a permanent scar but without permanent disability.

On the part of the appellant, evidence was tendered by **Charles Makori**, a supervisor then. He testified that the respondent was never an employee of the appellant and neither was he on duty as alleged or at all on the material day. He went on to state that the names of all casual labourers engaged at a given time were duly entered in a muster roll and there was no possibility of an employee being on the appellant's premises without his name being in the muster roll. The defence witness stated further that for the month of September 2004 they had only 92 casual labourers and hence there was no way that the respondent would have been issued with check roll number C115 the last number having been C92. He testified further that at all times a record of where each casual worker is assigned duty is kept and he produced as defence exhibit the allocation book for the material day where the respondent's name was not among those who were on duty. The muster roll bearing the names of all the casuals engaged in the month of September 2004 in which the name of the respondent was also missing was produced as defence exhibit as well. It was the appellant's testimony that whenever an accident occurred at its premises the name of the injured employee will be immediately recorded in an accident book kept by the appellant together with the nature of injuries sustained, the name of the witnesses and the name of the supervisor at the time. The accident book was produced as defence exhibit from which it was clear and evident that no accident or injury was reported or recorded on the 16th day of September 2004 by any person. Furthermore it was the appellant's case that if the respondent had been its employee for the month of September 2004 for him to have been paid his wages his name would have been in the month's pay sheet. The pay sheet for the period was produced as defence exhibit and the respondent's name was missing too. In the premises it was the defence case that the respondent was not its employee at the time of the alleged accident. It was the testimony of the defence witness that despite there being several sections within the appellant company there was only one muster roll, accident register and pay sheet for all the casual workers at the factory at any given time and therefore irrespective of where the worker was assigned duty his name would be entered therein. The defence further testified that upon engagement of casual workers they were instructed on how to carry out their duties and protective apparel provided. It was also stated on behalf of the appellant that the working environment at the factory was safe and all dangerous and moving machines were guarded or fenced off.

After full hearing of the case, the learned Senior Resident magistrate found in favour of the respondent holding interlia:-

"……..On the issue of liability, I have considered the evidence on record. The plaintiff narrated how the accident took place and produced document he was issued with at the time of treatment. The defence strength (sic) was that the plaintiff was not working at that time for the defendant. However, the defence admitted that at one point he was an employee of the defendant. If the plaintiff had ceased to work for the defendant, the defence could have adduced evidence of when the plaintiff's services were terminated. From the conduct of DWI I'm of the view that the plaintiff was an employee of the defendant at the material date of the accident. The plaintiff's evidence is credible and he even did mention the name of his supervisor by then who could possibly have been called by the defence to dispute…".

The appellant felt aggrieved by the judgment and decree aforesaid. It therefore lodged the instant appeal. It cited nine grounds of appeal in its memorandum of appeal dated 22nd November, 2006 and filed in court on 24th November, 2007 to with:-

1. The learned magistrate erred both in law and fact in pronouncing judgment in favour of the respondent when there was no legal or otherwise basis of doing so in light of there being no sufficient evidence adduced before him.

2. The learned magistrate erred both in fact and law by pronouncing judgment in favour of the respondent whereas the respondent had not proved his case on a balance of probabilities.

3. The learned magistrate erred both in fact and law by pronouncing judgment in favour of the respondent in total disregard of the evidence adduced before the court and in particular the evidence adduced on behalf of the appellant as there was glaring evidence that the respondent was not in the employment of the appellant or on duty on the alleged date of accident.

4. The learned magistrate erred both in fact and law by holding that the respondent had proved negligence as against the appellant on a balance of probabilities.

5. The learned magistrate erred both in fact and law in his apportionment of liability whereas the respondent had not proved negligence as against the appellant on a balance of probabilities.
6. The learned magistrate erred in both fact and law by proceeding to pronounce judgment in favour of the respondent in total disregard of the appellant's submissions.

7. The learned magistrate erred both in fact and law by failing to apply or applying wrong principles in assessment of damages thus awarding damages that were so excessive in the circumstances.

8. The learned magistrate erred both in law by failing to state in the judgment the statement of the case, the points for determination, the decision thereon and the reasons for such decision.

9. The judgment of the learned magistrate is in the circumstances unfair and unjust."

When the appeal came up for hearing before me on 5th May, 2010, **Mr. Lwanga** learned counsel for the appellant and **Mr. Onyari**, learned counsel for the respondent agreed to canvass the same by way of written submissions. The said submissions were subsequently filed and exchanged. I have carefully considered them alongside cited authorities.

As this is a first appeal, it is my duty to assess and re-evaluate afresh the evidence tendered before the subordinate court, bearing in mind however that I have neither seen or heard the witnesses and should, therefore make due allowance for the same. I must be sure that the findings of facts made by the learned magistrate were based on the evidence before the trial court and he had not acted on wrong principles in reaching its conclusion.

The issues for determination before the trial court as properly framed by the learned magistrate was who was liable if at all and the quantum. However before liability could attach on the appellant, the respondent had to show that at the time of the alleged accident he was in the employment of the appellant and that he was injured in the course of such employment. Did the respondent discharge that burden? I do not think so!

The respondent's testimony in court failed to prove that he was on duty or was injured whilst in the course of employment with the appellant on the material day. That being the case he was not in the employment of the appellant and therefore he was not owed duty of care by the appellant nor could thee have been breach of statutory duty or common law duty negligence on the part of the appellant.

The respondent did not have any credible documents to prove his employment with the appellant. He merely asserted that he was under employment by the appellant. As prove of the fact of alleged employment he tendered in evidence a sick sheet allegedly given to him by a supervisor by the name, Gideon. This evidence in my view was wholly unsatisfactory. In any event, the sick sheet is on the letter heads of **Kenya Tea Development Agency Co. Ltd**. The respondent made no efforts to provide the nexus and or linkage between the appellant and **Kenya Tea Development Agency Co. Ltd**. The same is not even a party to this suit.

The appellant on the other hand presented documentary evidence of the record of its employees and the respondent's name was missing in all the documents produced. It cannot be a mere coincidence that the respondent's name should be missing from the appellant's relevant records with regard to his employment. An attempt was made though feeble to suggest that the said records had been generated purposely for this case. However I don't think that there is any evidence to back up the claim. The appellant had nothing to gain by undertaking such an exercise. I would want to imagine that the appellant was insured against such risks. So that if the respondent's claim was genuine, the insurance would have taken up the risk under the Workman Compensation Act and not the appellant paying personally out of his coffers. In my view I think that the appellant's evidence was formidable to counter the feeble assertion of the respondent that he was employed by the appellant at the time of the alleged accident going by the documents tendered in evidence. Thus, the learned magistrate grossly misdirected himself when he reached the conclusion that since the appellant could not proof when the respondent's services were terminated and from the conduct of DW1 it was possible that the Plaintiff was still an employee of the defendant at the time of the accident. The case was filed by the respondent. It was up to him to prove by credible evidence that he was such an employee. It wasn't upto the appellant to prove anything. It was not right for the learned magistrate to shift to the appellant the burden of proving that the respondent was not its employee. It is trite law that whoever alleges must proof. The respondent failed to prove sufficiently that he was an employee of the appellant at the time of the accident. Indeed in holding the appellant liable on the basis of interferences the learned magistrate was clearly acting on speculations. That was not the hunting ground for the learned magistrate.

Even if I had been convinced to hold that indeed the respondent was an employee of the appellant, I would still have faulted him on liability. In the case of **ELD. HCCA NO. 94 OF 1997 – EASTERN PRODUCE (K) LTD VS. WILSON MARITIM BETT (UR)** it was held that the onus of proof of injury at work lies on the Plaintiff. It is not sufficient for a plaintiff to rely solely on the fact that he is employed by the defendant and that a spillage had occurred from equipment being used at the time by the plaintiff. For a plaintiff to succeed against his employer in establishing the tort of negligence or some breach of contract, it is necessary for the plaintiff to adduce evidence as to what happened unless it is a case where ***res ipsa loquitur*** applies. The court went to hold that in that case there were many ways in which the spillage could have occurred without any negligence by the employer. There were no witnesses who saw the alleged spillage so that the respondent should have explained how it happened.

In the case of **Abdalla Baya Mwanyule** vs. **Swalahadin Said t/a Jomvu total Service Station** Civil Appeal No. 211 of 2002 the court stated:

We think, what we have stated above is enough to show that the employer owes no absolute duty to the employee and the only duty owed is that of reasonable care against risk of injury caused by events reasonably foreseeable or which would be prevented by taking reasonable precaution.

In **Eastern Produce (K) Ltd. Vs. Patrick Chege Mwangi** the court stated that it is upon the plaintiff to prove negligence on the part of the employer and mere allegation is not sufficient. The court stated further that:

The employer is not an insurer of an employee. If an employee is injured on duty he is immediately entitled for workman compensation under Workman Compensation Act. If an employee goes further and claims for general damages then he has to prove negligence on the part of the employer.

From the evidence, the respondent stated that as he was offloading from the conveyor belt, he fell and was injured on his right leg, left leg and hand. That is all he could say. He could not show what made him fall, what the appellant would have done to prevent him from falling or what the appellant had done which amounted to negligence that caused him to fall. The respondent did not show the duty of care that the appellant owed him that would have prevented him from falling. He did not also show how the gumboots and gloves would have assisted him or prevented him from slipping and falling. What the respondent was engaged in was manual skill which did not require any training on how to work or close supervision. In any event the respondent did not say what sort of training was required for that kind of work. The learned magistrate did not address the issue as to what evidence had been led by the respondent to show that the falling down could have been avoided but for the breach of statutory duty and or negligence on the part of the appellant towards him. What was it that the appellant should have done such that it would have prevented the respondent from falling. I cannot think of any!

In sum there was no prove that the respondent was in the employment of the appellant at the time of the alleged accident and that he was injured in the course of such employment. There was also no prove that even if the respondent had been an employee of the appellant, the injuries were as a result of the appellant's breach of statutory duty, common law negligence towards the respondent. None of the particulars of breach of statutory duty or common law negligence was proved or at all. The respondent was thus undeserving of the judgment and decree.

For all the foregoing reasons, I allow the appeal and set aside the judgment and decree of the subordinate court. In substitution I order the respondent's suit in the subordinate court dismissed with costs to the appellant. The appellant too shall have the costs of this appeal.

Judgment dated, signed and **delivered** at Kisii this 17th June 2010.

ASIKE-MAKHANDIA
JUDGE